5-11-1976

A.E. Lewis and Virginia Lewis, his wife v. Brushy Creek Coal Company, Addington Brothers Mining, Inc., Addington Bros. Trucking, Inc., James R. Lewis and Pauline Lewis, his wife

Appellee's Brief 1976-SC-0219

APPELLEE'S BRIEF

554 S.W.2d 486

Supreme Court of Kentucky

FILE NO. 76-219

A. E. LEWIS and VIRGINIA LEWIS, HIS WIFE, - - - - - - - - - - Appellants,

VS:

BRUSHY CREEK COAL COMPANY, ADDINGTON BROTHERS MINING, INC. ADDINGTON BROS. TRUCKING, INC. AND JAMES R. LEWIS AND PAULINE LEWIS, HIS WIFE, - - - - Appellees.

APPEAL FROM ELLIOTT CIRCUIT COURT
(HON. RALPH N. WALTER, *Judge*)

BRIEF FOR APPELLEES,

WILHOIT & WILHOIT

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True copies of this Brief for Appellees, have been served on opposing counsel and upon the Trial Judge as required by RCA 1.205, this May 10, 1976.

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GRAHER PRINTING COMPANY, ASHLAND, KENTUCKY

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(B.) THE ELLIOTT CIRCUIT COURT DID NOT COMMIT REVERSIBLE ERROR IN DISMISSING THE PLAINTIFFS' SUBSEQUENT ACTION, NO. 1348, UPON THE GROUNDS THAT IT WAS BARRED BY THE DOCTRINE OF RES JUDICATA, CLAIM PRECLUSION OR EQUITABLE ESTOPPEL, WHERE IT APPEARED THAT IN A PRIOR ACTION, NO. 1328, THE PLAINTIFFS' ALLEGED CLAIM HAD RIPENED AGAINST THE DEFENDANTS THAT THE PLAINTIFFS DID NOT TAKE STEPS TO GO FORWARD IN PRESENTING THEIR CLAIM IN THE PRIOR ACTION.

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BRIEF FOR APPELLEES,

MAY IT PLEASE THE COURT:

COUNTER STATEMENT OF THE FACTS

The plaintiff-appellant, A. E. Lewis, and the defendant-appellee, James E. Lewis, are brothers. Appellants' brief is in error when it states that the original lease signed by James E. Lewis with Brushy Creek Coal Company was in October of 1974. (*Appellant's brief, page* 4), James had earlier testified that the lease was signed in October of 1974, but his testimony was later corrected (*Deposition, James E. Lewis, Q.* 85-87, *p.* 12), (*T. E.* 264). This fact is also corroborated by the appellant himself in his deposition. (*Deposition A. E. Lewis, p* 41), (*T. E.* 59). There should be no question that the original lease was executed in the fall of 1973 and that the appellant himself has testified that he knew that the lease had been executed by his brother and that preparations were being made to strip the coal.

The important fact to remember is that the record clearly shows that neither Brushy Creek Coal Company nor Addington Brothers Mining, Inc. had any knowledge of appellants' claim either at the time the leases were executed or at the time stripping commenced on the property.

The appellant was specifically asked what notice he gave appellees, Brushy Creek and/or Addington Brothers Mining, Inc., and he testified that he had a conversation with Mr. Ernest Parsons (a former stockholder[1] of Brushy Creek) and this conversation took place in September of 1974. (*Deposition, A. E. Lewis, page* 37), (*T. E.* 55).

Similarly, the appellant was aware of dozing for haul roads in early 1973; he had the statement of his brother James that he had leased the coal and "promised to divide the money." (*Deposition, A. E. Lewis, pages* 38-41), (*T. E.* 56-59).

Before the mining had commenced the following conversation took place between the Lewis brothers:

Q-274	They had not been mining at that time, had they?
A.	At the time James came to my home, no.
Q-275	What did you have to say about it?
A.	I objected and told him I would sue him if he stripped my coal. (Deposition, A. E. Lewis, page 42), (T. E. 60).

[1] Parsons ceased to be a stockholder and officer in February of 1974, which was seven months prior to the alleged conversation. (Deposition, John M. Keck, page 14)

He had a later conversation with his brother and threatened to do the same thing. Again, the mining operations had not commenced, (Deposition, A. E. Lewis, page 42-43), (T. E. 60-61).

The appellant had retained counsel six or eight months prior to the first suit which was filed in August of 1974.

Q-342 Just give me your best judgment, how long before, Mr. Lewis, had you retained counsel before this lawsuit of James R. Lewis versus you was filed?

A. I had talked to my Attorney probably six or eight months before then.

Q-343 Had you talked to him or had you placed the matter in his hands to take some action?

A. I had placed the matter in his hands.

Q-344 To take some action?

A. Yes. (Deposition, A. E. Lewis, page 52), (T. E. 70).

Armed with the knowledge that his brother had executed a coal lease to the defendant, Brushy Creek Coal Company, Inc., and fortified by the services of counsel, the appellant testified as follows:

Q-321 Mr. Lewis, did you at anytime write your brother a letter in regard to this coal stripping or demand that he not strip the coal?

A. No.

Q-322 Did anyone employed by you write your brother or Brushy Creek or Addington Brothers, any letter demanding that the coal not be stripped?

A. Not to my knowledge.

* * * * * *

Q-324 Isn't it also true that at that time, the coal stripping had been going on for some time, isn't that true?

A. I think it was.

Q-325 Isn't it also true, Mr. Lewis, that in fact, the actual mining was almost completed when this suit by your brother against you was filed, isn't that true?

A. I'd say it was. (Deposition, A. E. Lewis, page 47-48), (T. E., 65-66)

ARGUMENT

(A.) THE ELLIOTT CIRCUIT COURT DID NOT COMMIT REVERSIBLE ERROR IN DISMISSING PLAINTIFFS' ACTION NO. 1348 UNDER CIVIL RULE 12.02 OR UNDER CR 13.01 WHERE THE PLAINTIFFS HAD FAILED TO GO FORWARD WITH THEIR ALLEGED CLAIM IN THE PRIOR ACTION NO. 1328.

The points and authorities raised in the appellants' brief in regard to Argument (A.) actually addresses itself to the ultimate question raised in Argument (B.) Suffice to say that the authorities cited in this portion of appellants' brief do not begin to touch this case in any way.

It is obvious that in *Hill* v. *Thomas, Ky.*, 299 *SW* 2*d* 633 (1957), the opinion dealt with a criminal appeal from an Order denying a petition for writ of coram novis and is clearly distinguishable on the facts.

The case of *Kentucky Lake Vacation Land, Inc.* v. *State Property and Buildings Commission, Ky.*, 333 *SW* 2*d* 779 (1960), makes the statement that a motion is not a pleading, however, it is not authority for appellants' position that they were relieved of any obligation to go forward in presenting this claim (if they had one) in the first proceeding. (Civil Action No. 1328). Of course, the same is equally true for additional cases cited in appellants' brief under this point. *Vincent* v. *City of Bowling Green, Ky.*, 349 *SW* 2*d* 694 (1961) and *Lippman, Inc.* v. *Hewitt-Robins, Inc., D. C. Wisc.* 55 *F.R.D.* 439.

As hereinafter argued, either under CR 12.02 or CR 13.01, the appellant was bound to proceed to judgment in Civil Action 1328. At this point in time the appellant had already threatened to sue his brother and knew that the appellee had leased the coal in his own name to Brushy Creek Coal, Inc. and if he had a claim he was bound to go forward at that time.

(B.) THE ELLIOTT CIRCUIT COURT DID NOT COMMIT REVERSIBLE ERROR IN DISMISSING THE PLAINTIFFS' SUBSEQUENT ACTION, NO. 1348, UPON THE GROUNDS THAT IT WAS BARRED BY THE DOCTRINE OF RES JUDICATA, CLAIM PRECLUSION OR EQUITABLE ESTOPPEL, WHERE IT APPEARED THAT IN A PRIOR ACTION, NO. 1328 THE PLAINTIFFS' ALLEGED CLAIM HAD RIPENED AGAIST THE DEFENDANTS THAT THE

PLAINTIFFS DID NOT TAKE STEPS TO GO FORWARD IN PRESENTING THEIR CLAIM IN THE PRIOR ACTION.

The plaintiffs brought their action on November 19, 1974. This was three and a half months subsequent to the prior suit filed by James R. Lewis. They brought their action for *wilful trespass* and demanded judgment for $2 million ninety-five dollars. (T. R. 5). Now that's a lot of dollars.

The application of res judicata, equitable estoppel or claim preclusion by any trial judge addresses itself to the sound discretion of the court.

Likewise, it has been said:

> "The doctrine of res judicata is but a manifestation of the recognition that endless litigation leads to confusion or chaos. The doctrine reflects the refusal of the law to tolerate a multiplicity of, or needless, litigation and is based on the worthy premise that the interest of the proper administration of justice is best served by limiting parties to one fair trial of an issue or cause."
>
> (46 Am. Jur. 2d, Judgments, Sec. 395, at page 561)

Appellants' brief misses the mark when it apparently takes the view that the ruling of the Elliott Circuit Court addressed itself to a holding that the doctrine of res judicata was to be applied to avoid a re-hash of prior litigation. In actuality, the main thrust of appellees' position and the holding of the court was that the appellants were compelled to go forward in the first action and when they failed to do so it was held that they could not maintain the second action.

There is no question but what the appellants' claim

had ripened in August of 1974. They were bound by the rules and case law to go forward. The court has held:

> ". . . The rule is elementary that, when a matter is in litigation, parties are required to bring forward *their whole case;* and "the plea of res judicata applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, *but to every point which properly belonged to the subject of litigation and which the parties,* exercising reasonable diligence, might have brought forward at the time." *Newman* vs *Newman Ky.* 451 *SW 2d* 417; *Combs* vs *Prestonsburg Water Co.* 260 *Ky.* 169, 84 *SW 2d* 15; *and Lock* vs *Commonwealth,* 513 *Ky.* 864, 69 *SW 2d,* 763, 764.

Likewise, it has been long recognized that a party may not split his cause of action. Therefore, if a cause of action should have been presented and the party failed to do so and the matter so again arise in another action, it will be held that the first action was res judicata as to all causes that *should* have been presented. *Newman* v. *Newman , supra, at page* 419.

Historically, the doctrine could not be invoked unless there was an identity of parties or privity established by the person seeking its protection. Many jurisdictions have now adopted a digerent rule.

In the case of *Sedley* v. *City of West Buechel, Ky.,* 461 *SW 2d* 556 (1971), the preclusion doctrine, so called, was adopted in this jurisdiction, although it was not directly applied in the *Sedley* case. The court said:

> "Many jurisdictions, however, have adopted the doctrine of "claim preclusion" or "issue preclusion" under which a person who *was not a party*

to the former action, so as to preclude the relitigation of an issue determined in a prior action. The rule contemplates that the court in which the plea of res judicata is asserted shall inquire whether the judgment in the former action was in fact rendered under such conditions that the party against whom res judicata is pleaded had a realistically full and fair opportunity to present his case. (At page 559) (Emphasis ours)

The *Sedley* case is also authority for our position that the court could rule on our motions to dismiss. The court said:

"Only in the absence of any issue of fact to where the facts are shown by the record and are not disputed may the defense be asserted by a motion to dismiss."

See also Butterman v. *Walston & Co., E. D. Wis.* 50 *FRD* 189 (1970).

The appellants complain that there was no prior adjudication of the merits in Civil Action No. 1328 and there having been no adjudication of the merits of that prior action, the dismissal in subsequent cause was unwarranted. Appellants cite and seek comfort by the Court's decision in *Philpot* v. *Minton, Ky.* 370 *SW* 2*d* 402 (1963).

Even a casual reading of Philpot quickly discloses that neither the Court nor anyone for that matter had any idea about why the Court dismissed the prior action. It was simply dismissed. Because of the unexplained dismissal the Court properly held that the defense of res judicata was not available.

The appellants ignore CR 41.02 (3) which provides:

"Unless the court in its order for dismissal under the Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an *adjudication upon the merits.*"
(Emphasis added).

There was an adjudication of the merits in *Civil Action No.* 1328. We know why the Court dismissed the prior suit just as we know the reason why the Court dismissed the subsequent suit. The appellants had filed a Motion to Dismiss in the first action setting out fully the grounds upon, as follows to, wit: (1) one joint owner of real estate cannot claim adversely against other joint owners of said real estate, and (2) one joint owner of real estate cannot acquire title or color of title by reason of his voluntary payments of taxes as against other joint owners of the same real estate." (T. R. 323).

In addition to this, the appellants furnished the Court with a detailed Memorandum in support of their Motion to Dismiss citing the cases. (T. R. 324-325). On the 22nd day of August, 1974, the appellants gave James Lewis notice that they would bring their Motion to Dismiss on for hearing and as a result of that hearing, and on September 17, 1974 the Court entered an Order dismissing the complaint and gave the Motion of the appellants as the basis for the Court's decision. (T. R. 327).

As we can readily see from the foregoing, there was an adjudication of the merits in the prior suit. To be sure, the proceedings were not lengthy, but we have been unable to find any authority to the effect that such would be a controlling consideration.

The issue in the prior suit, *Civil Action No.* 1328, addressed itself to the title concerning the real estate involved in the subsequent suit. Had James Lewis sued his brother in that prior action for negligence arising out of an automobile accident in some prior year the appellants would not have been under any compulsion by the Rules of Civil Procedure to have counterclaimed for his royalties allegedly due him. Clearly there would have been no similarity of issues or subject matter of the litigation.

But the two cases at bar involved the title to the same real estate and the derivative rights thereunder and it is submitted that the Court was correct in its ruling but as argued by appellees we believe the proper rule was CR 13:01.

In regard to the equities of the matter, the Court undoubtedly was influenced and probably perplexed by counsel's willful failure to press on in the first suit. It is undisputed that James Lewis had employed counsel six or eight months before James Lewis' suit was filed in August of 1974. It is also undisputed (by appellants' own testimony) that during all this time neither he nor his attorney formally notified any of the appellees of James Lewis' claim. It was particularly important for appellees, Brushy Creek Coal Company, Inc. and Addington Brothers Mining, to have been made aware of these claims.

Brushy Creek had taken the lease originally without knowledge of appellants' claim. Appellant stood idly by while a considerable amount of money was spent

to develop the property — money which would have not otherwise have been spent had appellees been aware of Mr. Lewis' claim.

The appellants still remained silent during all of the stripping operations (presumably upon the advice of counsel) and Lewis admitted that neither he nor his attorney ever wrote a letter to Brushy Creek and/or Addington Brothers advising them of this claim and making a demand upon them to cease their mining operations.

The Court obviously concluded that appellants' tactics unnecessarily exposed James Lewis to exposure to liability for "willful trespass." James Lewis considered himself to be the sole owner of the property until his unsuccessful lawsuit of August, 1974. He had given Brushy Creek a lease purporting to own the entire fee simple title and warranted the same to them.

It was not until three and a half months following the first suit that counsel decided that the time was right to move. Hence, the second suit. The trial court properly refused to keep the courthouse doors open for appellants' tactics indefinitely and quite properly dismissed the suit.

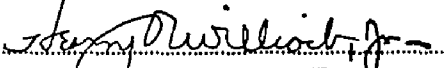
CONCLUSION

For the reasons stated and upon authorities cited, we submit to the Court that the Judgment rendered

below was correct and the same should accordingly be affirmed.

Respectfully Submitted

WILHOIT and WILHOIT

BY: 

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